

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

TROUT UNLIMITED, NATIONAL WILDLIFE  
FEDERATION, OREGON NATURAL  
RESOURCES COUNCIL FUND, PACIFIC  
COAST FEDERATION OF FISHERMEN'S  
ASSOCIATIONS, and INSTITUTE FOR  
FISHERIES RESOURCES,

Plaintiffs,

v.

D. ROBERT LOHN, in his official capacity as  
Regional Administrator of the National Oceanic &  
Atmospheric Administration Fisheries Service's  
Northwest Region, and NATIONAL MARINE  
FISHERIES SERVICE,

Defendants.

CASE NO. C05-1128C

ORDER

I. INTRODUCTION

This matter has come before the Court on the Federal Defendants' motion to dismiss (Dkt. No. 18). Having carefully considered the papers filed by the parties in support of and in opposition to the motion, the Court has determined that no oral argument shall be necessary. For the reasons that follow, the motion to dismiss is DENIED.

1 II. BACKGROUND

2 Plaintiffs brought this action to challenge the National Marine Fisheries Service's ("NMFS")  
3 promulgation of its Policy on the Consideration of Hatchery-Origin Fish in Endangered Species Act  
4 Listing Determinations for Pacific Salmon and Steelhead ("Hatchery Listing Policy" and "HLP"), 70 Fed.  
5 Red. 37, 204 (June 28, 2005) (to be codified at 50 C.F.R. pts. 223 & 224).

6 The HLP was formulated in response to a court ruling "invalidat[ing] the practice described in the  
7 Interim Policy of generally excluding hatchery stocks that . . . were part of the same 'distinct population  
8 segment' (DPS) as the listed natural populations." Hatchery Listing Policy, 70 Fed. Reg. at 37,205.  
9 Under the new HLP, "hatchery stocks determined to be part of a DPS will be considered in determining  
10 whether a DPS is threatened or endangered under the ESA, and will be included in any listing of the  
11 DPS." *Id.* The HLP goes on to set forth a five-step process for the NMFS to follow in making listing  
12 determinations for "evolutionarily significant units" ("ESU") of Pacific salmon and steelhead.

13 The first step is to recognize that a DPS of "a Pacific salmon or steelhead species is considered  
14 for listing if it meets two criteria: (a) it must be substantially reproductively isolated from other  
15 conspecific population units; and (b) it must represent an important component in the evolutionary legacy  
16 of the species." *Id.* at 37,215. The second step specifies:

17 In delineating an ESU to be considered for listing, NMFS will identify all components of  
18 the ESU, including populations of natural fish and hatchery stocks that are part of the  
19 ESU. Hatchery stocks with a level of genetic divergence relative to the local natural  
20 populations(s) that is no more that what occurs within the ESU: (a) are considered part of  
21 the ESU; (b) will be considered in determining whether an ESU should be listed under the  
22 ESA; and (c) will be included in any listing of the ESU.

23 *Id.* The third step emphasizes, in contrast to the previous Interim Policy, that "[s]tatus determinations for  
24 Pacific salmon and steelhead ESUs will be based on the status of the *entire* ESU." *Id.* (emphasis added).

25 The fourth step explains that status determinations "generally consider four key attributes: abundance;  
26 productivity; genetic diversity; and spatial distribution," and that inclusion of hatchery fish in an ESU,  
when appropriate under the second step, can either positively or negatively affect the overall status of the

1 ESU. *Id.* The final step provides that “[f]or ESUS listed as threatened, NMFS will, where appropriate,  
2 exercise its authority under section 4(d) of the ESA to allow the harvest of listed hatchery fish that are  
3 surplus to the conservation and recovery needs of the ESU, in accordance with approved harvest plans.”  
4 *Id.* at 37,215–16.

5 Plaintiffs’ challenge to the HLP is based on two claims: (1) the allegation that the Federal  
6 Defendants failed to prepare an environmental impact statement or environmental assessment with  
7 respect to the HLP, as required by the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4332;  
8 and (2) the allegation that the HLP runs counter to the best science mandate of the Endangered Species  
9 Act (“ESA”). Plaintiffs’s claims are presented to this Court pursuant to the Administrative Procedure  
10 Act (“APA”, 5 U.S.C. § 551 *et seq.*

### 11 III. ANALYSIS

#### 12 A. *Applicable standard*

13 Rule 12(b)(6) of the Federal Rules of Civil Procedure provides that an action will be dismissed for  
14 failure to state a claim upon which relief may be granted. A court will grant dismissal only if “it appears  
15 beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to  
16 relief.” *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957). While a court must accept all material allegations  
17 in the complaint as true and construe them in the light most favorable to the nonmoving party, conclusory  
18 allegations of law or unwarranted inferences of fact urged by the nonmoving party are insufficient to  
19 defeat a motion to dismiss. *Ove v. Gwinn*, 264 F.3d 817, 821 (9<sup>th</sup> Cir. 2001). In addition, a court’s  
20 obligation to construe allegations in the light most favorable to the nonmoving party does not mean that  
21 those allegations must be construed in a light favorable to the nonmoving party, if such a construction  
22 cannot reasonably be made.

23 Here, the Federal Defendants argue that although the APA authorizes judicial review of a “final  
24 agency action for which there is no other adequate remedy in a court,” 5 U.S.C. § 704, Plaintiffs have  
25 failed to state a claim because the Hatchery Listing Policy is not a “final agency action.”

1           B.       *Is the Hatchery Listing Policy a “final agency action”?*

2           Plaintiffs bring this action under the general review provisions of the APA, 5 U.S.C. § 704, as  
3       opposed to pursuant to specific authorization in the substantive statute. Section 704’s general review  
4       provision authorizes judicial review of a “final agency action.” Thus, the aggrieved party must identify an  
5       “agency action,” and that action must be “final.”

6                   I.       “Agency action”

7           “Agency action” is defined in § 551, *see id.* § 701 (specifying that for the purposes of chapter 7,  
8       governing judicial review, “agency action” is as defined in § 551), as including “the whole or a part of an  
9       agency rule, order, license, sanction, relief, or the denial thereof, or failure to act.” “Rule” means “the  
10      whole or a part of an agency statement of general or particular applicability and future effect designed to  
11      implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice  
12      requirements of an agency.” *Id.* One of the questions before the Court is whether the challenged HLP  
13      constitutes a “rule”, thus qualifying as an “agency action”. The Court concludes that it does.

14           “When interpreting a statute, ‘[o]ur task is to construe what Congress has enacted.’” *Carson*  
15      *Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863, 877 (9<sup>th</sup> Cir. 2001) (quoting *Duncan v. Walker*, 533  
16      U.S. 167, 172 (2001)). The Court must begin with the language of the statute. *Id.* “It is elementary that  
17      the meaning of a statute must, in the first instance, be sought in the language in which the act is framed.”  
18      *Id.* (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)). “When there is no indication that  
19      Congress intended a specific legal meaning for [a] term, the court may look to such sources as  
20      dictionaries for a definition.” *United States v. Mohrbacher*, 182 F.3d 1041, 1048 (9<sup>th</sup> Cir. 1999).

21           Section 551’s definition of “rule” includes a great many types of “statements”. Of the statements  
22      included in § 551 are those such as the HLP, which is an agency statement of future effect which  
23      prescribes a policy and which also describes an agency procedure.

24           As a preliminary matter, the HLP clearly concerns “policy”. It is titled, in relevant part, “Policy  
25      on the Consideration of Hatchery-Origin Fish.” It references itself repeatedly as a “policy.” *See, e.g.*,

1 HLP, 70 Fed. Reg. at 37,215 (stating that “[t]his Policy . . . is a general statement of policy,” “[the]  
2 NMFS adopts the following policy . . . ,” “[t]his policy provides direction,” etc.). The Federal  
3 Defendants themselves concede that the HLP is a statement of policy. Finally, the HLP, as a document  
4 setting forth criteria and providing direction, fits the dictionary definition of “policy”, a term left  
5 undefined by the statute. According to the dictionary, “policy” means “[a plan or course of action . . .  
6 intended to influence and determine decisions, actions, and other matters,” or “[a] course of action,  
7 guiding principle, or procedure considered expedient, prudent, or advantageous.” THE AMERICAN  
8 HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1358 (4<sup>th</sup> ed. 2000).

9 In addition, the HLP “prescribes” the policy therein within the meaning of § 551. “Prescribe” is  
10 not defined by the statute. However, its dictionary definition is “[t]o set down as a rule or guide” or “[t]o  
11 establish rules, laws or directions.” *Id.* at 1387. The HLP repeatedly states that “[t]his policy provides  
12 direction,” and “establishes criteria for including hatchery stocks.” *See, e.g.*, HLP, 70 Fed. Reg. at  
13 37,215 (section titled “Policy Purpose”). Thus, the Court finds that the HLP “prescribes policy” within  
14 the meaning of § 551’s definition of “rule.”

15 The HLP could also be understood to describe an agency procedure, namely the procedure by  
16 which the NMFS will consider hatchery fish when making ESA listing determinations regarding ESUs of  
17 Pacific salmon and steelhead.

18 For these reasons, the Court finds that the HLP is a “rule,” and is thus an “agency action” within  
19 the meaning of §§ 551 and 701.<sup>1</sup>

---

20  
21 <sup>1</sup>To the extent that the Federal Defendants argue that the HLP is a “general statement of policy”  
22 as opposed to a “substantive rule,” this distinction is inapposite to the consideration of whether a  
23 statement of policy is a “rule”—unqualified by the adjective “substantive”—within the meaning of § 551  
24 and constituting “agency action.” The distinction between a “general statement of policy” and  
25 “substantive rule” is primarily employed in considering whether a particular rule is subject to the APA’s  
notice and comment requirements as set forth in 5 U.S.C. § 553(b)–(c). *See, e.g., Mada-Luna v.*  
*Fitzpatrick*, 813 F.2d 1006, 1011–1017 (9<sup>th</sup> Cir. 1987) (performing the analysis of whether a directive  
qualifies as a “general statement of policy” within the meaning of § 553’s exception to the notice and  
comment requirements).

## 2. “Final”

An action is considered a “final agency action” if it (1) marks the “consummation” of the agency’s decisionmaking process”, and (2) is one which determines rights and obligations or “from which legal consequences will flow.” *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (quotations omitted). “The finality doctrine is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury.” *Indus. Customers of Nw. Utils. v. Bonneville Power Admin.*, 408 F.3d 638, 645 (9<sup>th</sup> Cir. 2005). “The core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties.” *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992).

For the purposes of this motion, the Federal Defendants have conceded that the challenged Hatchery Listing Policy marks the “consummation” of the agency’s decision-making process. However, the parties dispute whether the HLP determines rights and obligations or will cause legal consequences. The parties agree that the critical issue is whether the HLP binds the agency.

The Federal Defendants argue that the HLP neither definitely binds the NMFS nor “finally determines” the manner in which NMFS will treat hatchery-origin fish in any making its ESA listing determination for any particular fish. The Federal Defendants are correct that the HLP does not require the NMFS to consider hatchery-origin fish in the context of any particular DPS. They are also correct that the HLP does not finally determine that hatchery-origin fish will be considered in any specified DPS. However, unlike the factual scenario in *Alsea Valley Alliance v. Evans*, 161 F. Supp. 2d 1154 (D. Or. 2001), in which the plaintiffs challenged a final rule listing coho salmon as “threatened,” Plaintiffs in the instant action directly challenge the HLP itself rather than a particular listing determination. Thus, the Federal Defendants’ arguments regarding the relationship of the HLP to a listing determination for any particular fish are irrelevant to the finality analysis that must be performed in the case at bar. Instead, the questions that must be answered are (1) does the HLP finally determine how NMFS will treat hatchery fish during the listing process; and (2) whether the HLP binds the agency or whether it is “merely a

1 guidance document that can be ignored.” (*See* Pls.’ Opp’n 5.)

2       The Federal Defendants point out that the HLP describes itself as a “general statement of policy,”  
3 and as such may be modified or deviated from at any time, either in the course of any specific listing  
4 determination or by issuing a superceding policy. The Federal Defendants also point to several instances  
5 of permissive, rather than mandatory, language in the policy.

6       The fact that the HLP may be modified at any time is not dispositive. Simply because it may be  
7 modified at any time, and even if it may be modified without notice, does not mean that it does not bind  
8 the agency or otherwise dictate the manner in which the NMFS makes listing determinations while it  
9 remains unmodified.

10       As for the policy’s language, the Federal Defendants argue that “[t]he primary consideration in  
11 determining an agency’s intent . . . is ‘whether the text of the agency statement indicates that it was  
12 designed to be binding on the agency.’” (Fed. Defs.’ Reply 3 (quoting *Farrell v. Dep’t of Interior*, 314  
13 F.3d 584, 591 (Fed. Cir. 2002).) In addition, the Federal Defendants argue that the Court should give the  
14 NMFS’s description of the HLP’s character some deference. While an agency’s characterization of its  
15 pronouncements are entitled to some deference, they are not determinative. *See, e.g., Nat’l Ass’n of*  
16 *Homebuilders v. Norton*, 415 F.3d 8, 14 (D.C. Cir. 2005) (“An agency’s past characterization of its own  
17 action, while not decisive, is entitled to respect in a finality analysis.”).

18       A careful reading of the text reveals the HLP, despite some permissive language, to be mandatory  
19 in its key operative parts. Here, the HLP is expressly labeled a “general statement of policy.” 70 Fed.  
20 Reg. at 37,215 (explaining why the HLP is not subject to 5 U.S.C. § 553’s notice and comment  
21 procedures). The HLP also repeatedly employs phrases such as “provides direction” that are less than  
22 mandatory in nature. However, the step-by-step process for the NMFS’s consideration of hatchery fish  
23 in any given DPS is *not* optional. The HLP mandates that “NMFS *will* identify all components of the  
24 ESU, including populations of natural fish . . . and hatchery stocks that are part of the ESU.” 70 Fed.  
25 Reg. at 37,215 (emphasis added). The HLP goes on to mandate that hatchery stocks meeting given

1 genetic divergence criteria “(a) *are* considered part of the ESU; (b) *will be* considered in determining  
2 whether an ESU should be listed . . . ; and (c) *will be* included in any listing of the ESU.” *Id.* (emphasis  
3 added). Thus, the HLP, despite some permissive language, is straightforward in (1) requiring that  
4 hatchery stocks be considered in determining the composition of an ESU, and (2) requiring that hatchery  
5 stocks meeting certain criteria be included in the ESU. These critical portions of the HLP are not  
6 accompanied by any language suggesting that NMFS personnel would be free to deviate from this  
7 procedure, *i.e.*, that they could decline to consider hatchery fish in identifying the components of an ESU,  
8 or that they could decline to exclude hatchery fish meeting the genetic divergence criteria from the ESU  
9 and any possible listing of that ESU. Therefore, the Court finds that HLP does, indeed, bind the NMFS  
10 to consider hatchery fish, and include hatchery fish if certain criteria are met, in making its ESA listing  
11 determinations.

12 In addition to the binding nature of the HLP, the Court also finds that the HLP “amounts to a  
13 definitive statement of the agency’s position.” *Indus. Customers*, 408 F.3d at 646 (identifying factors  
14 which can provide “indicia of finality”). The HLP is described as the NMFS’s “final policy addressing the  
15 role of” hatchery fish in ESA listing determinations. The process prescribed in the HLP for considering  
16 hatchery fish recognize and execute on the NMFS’s position that “genetic resources that represent the  
17 ecological and genetic diversity of [a] species . . . can reside in a fish spawned in a hatchery as well as in a  
18 fish spawned in the wild.” 70 Fed. Reg. at 37,215.

19 Because the HLP binds the NMFS and because it is a definitive statement of the agency’s  
20 position, the Court finds that the HLP satisfies the second prong of the *Bennett* finality test. Therefore,  
21 the NMFS’s adoption of the HLP amounts to a final agency action suitable for judicial review.  
22 Accordingly, Defendants’ motion to dismiss Plaintiffs’ First Amended Complaint for failure to challenge a  
23 final agency action shall be DENIED.



1 IV. CONCLUSION

2 In accordance with the foregoing, the Federal Defendants' motion to dismiss is hereby DENIED.

3  
4  
5 SO ORDERED this 30th day of November, 2005.

6  
7  
8   
9 UNITED STATES DISTRICT JUDGE  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25